In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 432

JAMES R. HOFFA, LARRY CAMPBELL, THOMAS EWING PARKS AND EWING KING, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 376 F. 2d 1020. The opinion of the district court (App. 102a–110a) is reported at 247 F. Supp. 692.[1]

JURISDICTION

The judgments of the court of appeals (Pet. App. B) were entered on May 2, 1967. A petition for rehearing was denied on June 1, 1967 (Pet. App. C). On June 15, 1967, Mr. Justice Stewart extended the

[1] References to "Pet. App." are to the Appendix to the Petition; references to "App." are to the Joint Appendix filed by the petitioners in the court of appeals.

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time for filing a petition for a writ of certiorari to and including July 31, 1967. On July 28, 1967 the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners' motion for a new trial on the ground of newly discovered evidence was properly denied.

STATEMENT

On March 4, 1964, after a jury trial in the United States District Court for the Eastern District of Tennessee, petitioners were convicted under 18 U.S.C. 1503 for corruptly endeavoring to influence petit jurors sitting in a 1962 criminal case against petitioner Hoffa which culminated in a hung jury (referred to herein as "Test Fleet"). Petitioner Hoffa was sentenced to four years' imprisonment (and $5000 fine) on each of two counts under which he was convicted, the term to run consecutively. Each of the other petitioners was convicted on only one count and was sentenced to imprisonment for three years. The convictions were affirmed by the court of appeals and by this Court. See *Hoffa* v. *United States*, 385 U.S. 293.

During the pendency of the appeal, petitioners filed in the district court[1] a motion for a new trial on the ground of newly discovered evidence, alleging that (1)

[1] Prior to the filing of this motion in the district court, the court of appeals had denied a motion to stay the appeal and to remand the case to the district court for consideration of a similar motion (App. 102a).

the government had through its agent—one Robert Vick—illegally interfered with the attorney-client relationship between Hoffa and his then attorney Z. T. Osborn, Jr.,[4] and (2) that the government had concealed witnesses and suppressed testimony in violation of the right to compulsory process. The motion alleged that the defense had first acquired knowledge of the government's intrusion into the attorney-client relationship in November 1964 and of the suppression of evidence in September 1964 (See App. 1a–4a).

Among the affidavits in support of the motion was one submitted by Osborn who was counsel for Hoffa until November 1963 when he was disbarred. Osborn's affidavit stated that, during his own trial in May 1964, he was supplied with notes of conversations between Walter Sheridan of the Department of Justice and Robert Vick, whom Osborn had employed as an investigator while representing Hoffa. Osborn's affidavit claimed that these admittedly "cryptic" notes showed that in 1963 Vick had been reporting Osborn's activities on behalf of his client to the government (App. 5a–15a).

Another affidavit filed with the motion was by one Sidney Simpson, who had been subpoenaed by the defense at petitioners' trial. He recited that he knew Edward Partin, the principal government witness, as a dope addict, and Partin had told him he was going to frame Hoffa. He further alleged that Partin, in the company of two men, unidentified except as "federal

[4] Information furnished by Vick as to 1963 conversations with Osborn led to Osborn's conviction for obstruction of justice in May 1964. See *Osborn* v. *United States*, 385 U.S. 323.

marshals", had instructed Simpson and other prospective witnesses not to talk or appear (App. 20a–30a).

In support of the motion, petitioners also filed excerpts of the testimony of Sheridan, Vick and Osborn at Osborn's trial, and three 1963 F.B.I. reports produced at that trial which set forth statements volunteered by Vick to the F.B.I.

Of the three F.B.I. reports introduced only one deals with Vick's report of actual work undertaken on behalf of petitioner Hoffa. That report set forth details of an investigation into the background of the foreman of the grand jury that was considering the obstruction of justice case and indicated that the purpose of the investigation was to obtain information which could be used later to convince the foreman to testify that he had improperly coerced witnesses. This report does not relate any conversations with either Osborn or petitioner Hoffa nor does it contain any information concerning activities at Osborn's law office (App. 47a–52a). The other two reports merely relate the fact that Vick informed the F.B.I. in June, 1963, that he was being employed by Osborn and that he was told "since he was in the employ of an attorney for James Riddle Hoffa and others who have been indicted in this matter, that the F.B.I. would not solicit information from him or direct his activities in this area in any manner" (App. 52a–54a). Similarly the excerpts of Sheridan's testimony which petitioners presented in the district court indicated that Sheridan told Vick that Sheridan would only be interested in hearing informa-

tion Vick might learn concerning illegal activities and that Sheridan specifically told Vick he was not interested in any other information (App. 56a–57a). In addition, the transcript of Vick's testimony contains the following answer, "as I understand your question that Mr. Sheridan and I had some plan or plot for me to go to work for Tommy Osborn—this isn't true" (App. 68a).

In response to the motion the government noted that none of the matters referred to by the defense were "newly discovered." Osborn's affidavit indicated that he knew of Vick's association with Sheridan as early as August, 1963, and the government referred the court to a portion of the transcript of Osborn's trial which indicated that during proceedings to disbar Osborn in November 1963 a tape recording of a conversation between Vick and Osborn had been used as evidence against him. Similarly, Simpson's affidavit itself disclosed that he was subpoenaed by the defense during petitioners' trial but was not called to testify. The government submitted an affidavit by Partin, in which he categorically denied that he ever used narcotics, that he ever told any prospective witness to hide or that he had ever told anyone that he was going to "frame" Hoffa (App. 91a–94a), and an affidavit by William H. Daniels, an Assistant District Attorney in Louisiana, which contradicted certain of Simpson's statements concerning his association with Partin and which specifically denied Simpson's allegation that Daniels had offered Simpson $25,000 for information about Hoffa (App. 94a–

100a). An affidavit by Sheridan explaining his notes was also submitted (App. 84a–89a).

The district court denied the motion, holding that the defense claims did not show newly discovered evidence or due diligence and that, in the circumstances, no hearing was required. It observed that, even if the allegation as to Vick were accepted as true, the relief granted would merely be what had already been accomplished—a trial without reference to Vick matters—and that the alleged evidence relating to Partin was merely cumulative impeaching material (App. 102a–110a).

ARGUMENT

The determination by both courts below that petitioners' allegations were not newly discovered and did not show basis for a new trial presents no question warranting review by this Court. *United States* v. *Johnson*, 327 U.S. 106, 111.

The record clearly supports the trial court's determination that the evidence relied upon by petitioners was not newly discovered because it was available to the defense at the time of trial in the exercise of due diligence. Despite his disbarment in November, 1963, Osborn attended and advised at petitioners' trial, which began on January 20, 1964, (App. 80a). His own affidavit indicates that in August, 1963, he was aware of the association of Vick and Sheridan, and during the disbarment proceedings in November, 1963, he became apprised of the nature of Vick's relationship with the government when he was confronted with tape recordings of his conversations with Vick.

(App. 8a, 79a–80a). That the information was communicated to petitioners is also evident from the motions filed by petitioners prior to trial seeking a continuance due to Mr. Osborn's withdrawal (App. 106a). Similarly, the record shows that Simpson did appear at trial in response to a subpoena from the defense. The same defense counsel who attested that he had pretrial information that Partin was a user of narcotics (App. 17a–18a), saw Simpson, instructed him to wait, and never called upon him again for information or testimony (App. 21a). Thus the trial court correctly concluded that, having failed to pursue the questioning of Simpson at the time of trial and not having raised any question concerning Vick's relationship to the government, petitioners had not exercised the due diligence necessary to entitle them to have these matters considered on a motion for new trial. See *United States* v. *Soblen,* 203 F. Supp. 542 (S.D.N.Y.), affirmed 301 F. 2d 236 (C.A. 2), certiorari denied, 370 U.S. 944; *United States* v. *Costello,* 255 F. 2d 876 (C.A. 2), certiorari denied 357 U.S. 937; *Dirring* v. *United States,* 353 F. 2d 519 (C.A. 1).

As to the substance of the allegations, the courts below properly concluded that they did not amount to a showing of governmental interference with the preparation of the defense or suppression of evidence. The record is clear that the F.B.I. neither sought nor received information from Vick as to defense strategy and that the agents in fact informed him that they would not solicit information with respect to his association with Osborn (App. 54a; See also App.

47a–53a); that Sheridan was only interested in "illegal activity" that Vick might observe (App. 56a); and that Vick understood this (App. 59a). Sheridan's scribbled jottings on which petitioners primarily rely show only (as to anything remotely pertinent here) that Vick discussed the illegal plans and approaches which had been used to tamper with named jurors in the 1962 Test Fleet case[4]—jurors other than those described in the instant indictment. This was no more than an account of past historical events and represented no intrusion into the councils of the defense. See *Hoffa* v. *United States*, 385 U.S. 293. The claim of "intentional" suppression is specious on its face where the allegedly suppressed witness was present at the trial and not called by the defense, and where government representatives allegedly witnessing an attempt at suppression are not identified. Petitioners have not met the burden of showing conduct which could conceivably furnish grounds for a new trial. See *United States ex rel Darcy* v. *Handy*, 351 U.S. 454, 462.

[4] Only in one instance does the affidavit of Osborn submitted by petitioners specifically explain how Sheridan's notations could be related to defense strategy. The claim is made that the name "Tippens" (a juror in the 1962 Test Fleet case) followed by the words "approach—to get off jury" capsules the defense story of one Medlin (a co-defendant in the present trial) that it was Tippens who was doing the approaching in an attempt to get excused from jury duty. The explanation is on its face tortuous. In the notes the name "Tippens" follows names of other Test Fleet jurors and references to the approaches allegedly used to tamper with them. Sheridan's affidavit describes these as merely historical facts (App. 86a).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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